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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *ET AL.*

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QUESTION PRESENTED

Whether Congress may require cable operators to carry the signals of a limited number of free over-the-air broadcast television stations?

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, Consumer Federation of America, National Council of Senior Citizens, International Association of Machinists and Aerospace Workers, AFL-CIO and the Office of Communication of the United Church of Christ, through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *ET AL.*

STATEMENT

Intervenor-Appellees Consumer Federation of America, National Council of Senior Citizens, International Association of Machinists and Aerospace Workers, AFL-CIO and the Office of Communication of the United Church of Christ ("CFA, *et al.*") adopt the Statement contained in the Brief of Appellees Federal Communications Commission and the United States of America.

SUMMARY OF ARGUMENT

Intervenor-Appellees CFA, *et al.* have entered this litigation on behalf of television viewers, whose First Amendment right to receive information is "paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

This case is not simply a dispute between and among competing program providers. In fact, it will have a profound impact on American democracy and self-governance. It will help determine how citizens work, learn and play.

Cable carriage of free, over-the-air TV is necessary to insure that *all* Americans receive access to a diverse range of broadcast service. Indeed, while all citizens have a stake in the outcome of this case, it is the 40% of American households which do *not* receive cable television service which will be most adversely affected if the viability of free TV is impaired. Along with the 60% of households which currently receive cable, they share a distinct First Amendment right to receive access to "the widest possible dissemination of information from diverse and antagonistic sources [which] is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

CFA, *et al.* generally adopt the views advanced by the federal Appellees. In this brief, however, they wish to stress three points:

First, with respect to the constitutional standard to be employed, CFA, *et al.* urge that in no event can cable television providers be afforded the same constitutional status traditionally applied to the expressive activities of the print medium. There are important differences between the nature of cable and the newspaper medium at issue in cases such as *Tornillo*.

This Court has frequently recognized that where government has helped create monopoly power which limits access for speakers, structural regulation to promote diversity advances First Amendment goals. Since must-carry is self-effectuating, and is not directed at the subject matter or viewpoint of what is carried on any cable system, it is not the type of content-based regulation which could trigger strict scrutiny.

In the event that this Court determines to apply *O'Brien-Ward* type intermediate scrutiny here, CFA, *et al.*, argue that must-carry easily passes muster. Appellants fall far short of the burden they must meet in mounting a facial challenge, as must-carry is narrowly tailored to advance important interests without imposing unnecessary additional restrictions.

Second, as to the interests advanced by must-carry, CFA, *et al.* emphasize that government has not only an important, but a compelling interest in furthering the public's right of access to a variety of information from diverse sources. The 1992 Cable Act advances this objective. Based on extensive ongoing oversight, Congress made findings of unprecedented detail about the nature of the incentive that cable operators have acquired to interfere with the free flow of information and their exercise of that power. It is the economically marginal stations and non-commercial stations which are especially vulnerable to cable's predation; must-carry insures that those stations, which often provide important additional source and viewpoint diversity, are available for all Americans.

Third, as to the operation of must-carry, CFA *et al.* call this Court's attention to the careful manner in which the 1992 Cable Act was crafted so as to narrowly tailor relief no broader than is necessary to advance these important priorities. In particular, they point to the close operational relationship between the must-carry provisions in Sections 4 and 5 of the 1992 Cable Act and the retransmission consent scheme set forth in Section 6. By modifying copyright provisions governing cable's use of broadcast signals, Congress gave larger, more powerful stations the opportunity to withhold their signals and to seek compensation for making them available. This self-executing, market driven process has created a strong incentive for broadcasters which may

not have needed the advantage of must-carry to opt against claiming mandatory carriage. In theory, and in actual operation, must-carry privileges have been employed only by those stations which were likely to have been denied carriage.

Several parties echo Judge Williams suggestion (in his dissent below) that there are less restrictive alternatives to achieve the same purposes as must-carry. But these devices do not adequately fulfill the same objectives. The newly-strengthened leased access mechanism provided in the 1984 Cable Act does not help insure access to TV service for the 40 percent of homes not subscribing to cable, does not help maintain a public broadcasting system and is in any event fraught with operational uncertainties. A/B switches do not work. Finally, Judge Williams' suggestion that direct subsidies could be provided is not only unwieldy, but ultimately far more intrusive in terms of the First Amendment.

ARGUMENT

Appellants CFA, *et al.* appear here on behalf of television viewers in the 40% of U.S. households which do not subscribe to cable, as well as the 60% of those that do receive cable. They ask this Court to sustain Sections 4 and 5 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), because it advances important First Amendment rights, specifically the public's right to receive information from diverse sources of information. The government has not only an important, but a compelling interest in advancing both this right and the statutory right of the public to receive free, locally-based, over-the-air broadcast stations.

CFA, *et al.* submit that Sections 4 and 5 of the 1992 Cable Act, should, at most, be subjected to an intermediate *O'Brien-Ward* standard of scrutiny. It is clear, that under

that standard, Sections 4 and 5 pass constitutional muster. Must-carry is narrowly tailored to serve the interest of the government in protecting the public's right to receive information from free, over-the-air broadcast television. The must-carry provisions work in tandem with the retransmission consent scheme in Section 6 to insure that the small, economically marginal stations are preserved through must-carry, while the larger, more viable stations which may not need must-carry can opt against claiming mandatory carriage.

Contrary to Judge Williams' suggestion, there is no "least restrictive alternative" to must-carry. Leased access channels do not help insure access to TV service for those who do not subscribe to cable, do not assist public television stations and would likely be unaffordable for the smaller stations which are most in need of must-carry. A/B switches are unwieldy. And the direct subsidies Judge Williams suggests invite far more government intrusion into First Amendment rights than must-carry ever could.

I. STRICT FIRST AMENDMENT SCRUTINY DOES NOT APPLY TO THE MUST-CARRY PROVISIONS, WHICH SHOULD BE EVALUATED, AT MOST, UNDER THE *O'BRIEN-WARD* INTERMEDIATE SCRUTINY STANDARD.

A critical threshold question in this case concerns the proper level of first amendment scrutiny applicable to must-carry. The cable interests argue that their medium is entitled to be evaluated under the same First Amendment standards as are newspapers and other print media. *See, e.g.*, Brief of Time Warner Entertainment Company at 14 ("Time Warner Br."). Moreover, they argue that must-carry is a content based regulation, and therefore must be examined under a "strict scrutiny" standard. *Id.*

This Court has recognized, however, that each communications medium "must be addressed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). *Accord, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).[1] The specific problems and characteristics of cable and the must-carry provisions make clear that strict scrutiny of these provisions is inappropriate, and that at most, intermediate scrutiny as in such cases as *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968), should be applied here.[2]

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[1]While Appellants and supporting *amici* generally acknowledge this principle, *see, e.g.*, Brief of Turner Broadcasting System, Inc. at 35 ("Turner Br."), Time Warner Br. at 12, Brief of United States Telephone Association *et al.* at 8 ("Telephone Companies Br."), *amicus* Citizens for a Sound Economy advances the view that this Court should overrule these decisions and assess First Amendment claims without regard to the individual characteristics of the particular medium of expression under consideration. *See generally*, Brief of Citizens for a Sound Economy ("CSE Br."). Leaving aside the disruptive impact of jeopardizing decades of settled law in disparate areas of commerce and expression, this proposition would be extremely unwise. For one thing, it would make it much more difficult to proceed with routine, non-content based regulation with respect to the mass media. Every day, local, state and federal bodies at least indirectly facilitate or restrict speech by reasonably (or unreasonably) granting (or denying) licenses, permits, franchises, variances, etc. It is impossible to assess each of these decisions without taking into account the specific characteristics of the medium seeking such benefits.

[2]*Amici* CSE and Telephone Companies argue that utilizing a different First Amendment standard for cable than for other media would somehow impede the growth of new electronic communications technologies, which will deliver information largely over fiber optic wire and coaxial cable. CSE Br. at 11; Telephone Companies Br. at 9-12. This

A. The Cable Medium Is Fundamentally Different From Newspapers, And Should Therefore Be Subject To Different First Amendment Standards.

Because there are important differences between the nature of the newspaper medium at issue in *Tornillo* and the cable industry, this Court should reject Appellants' argument that regulation of both should be evaluated pursuant to identical First Amendment standards. While economic constraints clearly apply to both media, anyone can publish a newspaper without seeking government permission. Unlike cable, newspapers do not need special rights-of-way controlled by government, detailed systems of government franchising and special copyright legislation.[3] Indeed, a cable operator with a government franchise obtains a "virtual monopoly over its area" which is granted by the government it-

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argument assumes too much. Much of the technology to which they refer is nascent; for the next decade at least, broadcasting and cable television will remain the primary source of news and information for the vast majority of the American public. Moreover, there is no guarantee, and quite a bit of skepticism, that these technologies will soon, if ever be available to, or desired by, the public. *See* Robichaux, *Highway of Hype: Despite Many Claims for 500 Channel TV, Long Road Lies Ahead*, Wall St. J., Nov. 29, 1993 at A1, col 6. If these technologies live up to their promise of offering unlimited, non-discriminatory two-way access, future courts will have no problem granting the highest level of First Amendment protection to them.

[3]It is indeed ironic that Appellants here seek to rid themselves of any obligation to carry over-the-air stations after capitalizing on years of free use of those signals pursuant to the compulsory copyright laws. Copyright Revision Act of 1976, 17 U.S.C. §§ 101, *et seq.* The cable industry's ability to carry broadcast stations free of charge during its nascent years has undoubtedly been one of the primary reasons for the industry's rapid growth. 1990 Cable Report, 5 FCC Rcd 4962, 5038 (1990).

self. *Chicago Cable Communications v. Chicago Cable Comm'n.*, 879 F.2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). *See also* §II.A., *infra*.

In the context of broadcasting, this Court has recognized that where government has helped create a monopoly with respect to a communicative function which limits access and diversity, structural regulation to promote diversity and access is permissible and should not be subject to strict scrutiny. *See Associated Press v. United States*, 326 U.S. 1 (1945); *FCC v. NCCB*, 436 U.S. 775 (1975). The same rationale applies to cable as well, as this Court has already suggested in upholding previous FCC cable rules. *See e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). As *Amicus Curiae* American Civil Liberties Union ("ACLU") has pointed out, any contrary rule would threaten not only the constitutionality of other efforts to promote access and diversity such as cable leased access rules adopted pursuant to 47 U.S.C. §532(b), but would also call into serious question the propriety of the government-granted monopoly itself. *See* Brief of American Civil Liberties Union at 6, 9-10 ("ACLU Br.").

B. Strict Scrutiny Is Inapplicable To Must-Carry.

Appellants assert that strict scrutiny applies because the must-carry provisions affect the content of what is carried by cable operators. Time Warner Br. at 14-31; Brief of Daniels Cablevision, Inc. at 5-15 ("Daniels Br."); Turner Br. at 23-27; Brief of the National Cable Television Association at 16-34 ("NCTA Br.");Brief of Discovery Communications Inc. at 23-32 ("Discovery Br."). In support of that argument, they claim that the must-carry provisions are analogous to the newspaper right-to-reply provisions struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Time Warner Br. at 23-25; Daniels Br. n.34; Turner Br. at 30-31, n.53 and accompanying text; NCTA

Br. at 18; Discovery Br. at 47-48.

Appellants' claim ignores the fact that this Court has frequently declined to apply strict scrutiny to rules that affect the content of expression in some manner. This Court, *inter alia*, has upheld laws requiring reasonable access to broadcast time for federal candidates, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), as well as a statute effectively banning nude dancing. *Barnes v. Glen Theaters, Inc.*, 111 S.Ct. 2456 (1991).

Like the laws at issue in *CBS, Inc.* and *Barnes*, must-carry does not constitute the type of content-based regulation that triggers strict scrutiny.[4] Must-carry is not directed at the subject matter or viewpoint of what is carried on any cable system. It does not require, for example, that an operator permit a reply to attacks on a political candidate as in *Tornillo*, or limit "violent" or "indecent" programming. It applies whether a local broadcast station is independent or network-affiliated, English or Spanish-language, religious or secular--indeed, regardless of its content or subject matter. As such, must-carry is structural regulation aimed at increasing access and diversity, not content restriction which triggers strict scrutiny. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980) (rejecting First Amendment challenge to law mandating access to shopping centers for speech-related activities). Both because of the characteristics of must-carry itself and the nature of the

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[4]Contrary to the suggestion of Appellants, *see* Time Warner Br. at 15, this conclusion is not based on reflexive deference to Congress' view or intent that the must-carry provisions are not content-based regulations warranting strict scrutiny. CFA, *et al.* agree that where First Amendment rights are at stake, the Court must itself make this determination by examining the nature of the rules and the medium at issue.

cable medium, therefore, strict scrutiny is not applicable.

C. At Most, Intermediate Scrutiny In The Context Of A Facial Challenge Applies To Must-Carry.

The court below rejected strict scrutiny, and concluded that the must-carry provisions should be subjected to the *O'Brien-Ward* intermediate level of scrutiny. *Turner Broadcasting, Inc. v. FCC*, 819 F.Supp. 32, 45 (D.D.C. 1993). Under that standard, must-carry must be sustained if it is narrowly tailored to accomplish an important or substantial government objective. *See O'Brien, supra*, 391 U.S. at 377. Thus, the court implicitly recognized that just as there was an incidental effect on expression and its content in the noise regulation in *Ward* and the draft card rules in *O'Brien*, there is no more than an incidental effect here. The *O'Brien-Ward* standard permits appropriate deference to Congress' regulatory objectives in enacting must-carry while safeguarding against any incidental incursions on First Amendment interests.

To the extent that intermediate scrutiny is applied in this case, however, it is important to keep in mind that this is a facial challenge to Congress' must-carry provisions. As this Court has recognized, a facial challenge is "the most difficult challenge to mount successfully" because the "challenger must establish that no set of circumstances exist under which the Act would be valid." *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). In other words, even if a cable operator could show in an individual case that must-carry is not narrowly tailored to achieve an important government objective in light of the burden on expression in that case, the cable interests cannot prevail here unless they could establish that must-carry can *never* be so justified, either

specifically or in general.[5]

Under these circumstances, it is clear that the must-carry provisions on their face meet the *O'Brien-Ward* standard. As discussed below, must-carry promotes important governmental interests and is narrowly tailored to achieve that objective.

II. THE MUST-CARRY PROVISIONS FURTHER THE GOVERNMENT'S IMPORTANT INTEREST IN ADVANCING THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM FREE, OVER-THE-AIR BROADCAST TELEVISION.

The public has a distinct and "paramount" First Amendment right to receive a variety of information from diverse sources. They also have a specific statutory right

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[5]It is of particular salience to note that the FCC has adopted rules allowing broad latitude for granting waivers from must-carry wherever they can be justified in an individual case. 47 C.F.R. §76.7(a). Moreover, because this case was resolved on summary judgment, there were no issues of material fact genuinely in dispute in the court below. In this context, CFA, *et al.* submit that the ACLU's suggestion that this case be remanded for factual findings is misplaced. ACLU Br. at 17. The appropriate time to have raised any such concerns would have been before the court below when it considered the motions for summary judgment. In any event, any specific factual issues on must-carry can, and may yet, be raised in challenges to the must-carry rules as they have been applied. It is in this specific context where such factual matters can be explored. As this Court has recognized, a ruling that a statute complies with the First Amendment on its face does not preclude an as-applied challenge. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988). Indeed, two cases challenging the must-carry provisions as-applied have already been brought in two different federal district courts in California. *See Community Cablevision Company v. FCC*, No. CV 92-3104-R (C.D. Cal.); *Viacom International, Inc. v. FCC*, No. C-93-2984 (N.D. Cal.).

under the Communications Act of 1934 to receive such information from free, over-the-air broadcast stations, which, unlike cable systems, must serve all local residents and not just their paid-up customers. This Court has recognized that government has not simply an important interest, but a compelling interest in furthering these rights. *See Metro Broadcasting Co. v. FCC*, 497 U.S. 547 (1990), *Red Lion Broadcasting Co. v. FCC, supra*, *CBS v. DNC*, 412 U.S. 94, 102 (1973).

In challenging the must-carry provisions of the 1992 Cable Act, Appellants and their supporting *Amici* seek to emasculate these crucial rights. Congress has found that, without carriage over cable systems, many over-the-air stations will be at risk. *See* 1992 Cable Act, Section 2(a)(16).[6] The greatest impact of lost cable carriage would

be felt by economically marginal UHF stations. "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988. The ownership and management of these stations are disproportionately composed of those without other media interests, and persons from a diverse range of ethnic and social backgrounds, including minorities and women. Thus, these stations make an especially significant contribution to diversity in the marketplace of ideas. Reduced advertising revenues (and, in the case of noncommercial stations, viewer contributions) which would accompany the loss of cable carriage would reduce funds available to these stations for local and other programming. H.R. Rep. No. 628, 102d Cong., 2d Sess. 26-28 (1992)("H.R. Rep."); S. Rep. No. 92, 102nd Cong., 1st Sess. 1-2 (1991)("S. Rep."). Congress has found that there is also a good chance that these stations may not be able to survive. *Id.*; *see also* 1992 Cable Act, Section 2(a)(16).

This prospect is to the detriment of television viewers, "who are most directly concerned with and intimately affected by the performance of a [broadcast] licensee." *UCC v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966). In the absence of must-carry protections, television viewers will be less likely to receive what has been theirs for decades: access to free over-the-air television and the quality local programming it often provides. And the 40% of the cable households that do not receive cable (disproportionately the

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[6] "There has been considerable discussion in this case about the appropriate degree of deference to be afforded to Congressional findings. This Court has recognized that: "We must pay close attention to the expertise of the Commission and the fact-finding of Congress when analyzing the nexus between minority ownership and diversity. *With respect to this complex empirical question, we are required to give great weight to the decisions of Congress and the experience of the Commission. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990) (emphasis added). For several reasons, similar deference is appropriate here. First, the Congressional findings here do not focus on the issue of whether must-carry is content-based. *CFA, et al.* agree that in the case of findings of that type, an independent judicial determination is appropriate. *See, supra*, note 4. Second, as was the case in this Court's *Metro Broadcasting* decision, the detailed and weighty findings in this case relate to complex, empirical questions which Congress has explored with almost unprecedented thoroughness. Finally, the findings do not concern such sensitive First Amendment-specific issues as whether particular types of speech have good or bad effects. Rather, they are essentially economic and industry-related facts particularly within Congress' competence, several of which this Court has already acknowledged. *See United States v. Midwest Video*, 406 U.S. at 664 (noting that controlling cable's potential "competitive impact" on "broadcast services" justified regulation of cable); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 714 (1984) (acknowledging important federal interest in "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems").

young, the old and the poor), will be left without over-the-air television, which is their primary source of news and information. The likely consequence of such action would be an acceleration of trends leading to a society of information haves and have-nots.

A. The Government Has A Compelling Interest In Advancing The Viewing Public's Distinct And "Paramount" First Amendment Right To Receive Information From Free, Over-The-Air Broadcast Television.

An essential First Amendment right this Court must consider in determining the constitutionality of the must-carry provisions is the public's "paramount" right to *receive* information. *CBS, Inc. v. FCC*, 453 U.S. at 395-396; *CBS v. DNC*, 412 U.S. at 94, *Red Lion*, 395 U.S. at 390. It has long been understood that the government has a compelling interest in furthering that right. *See generally, Red Lion, supra, CBS v. DNC, supra, Metro Broadcasting supra*. In this case, where the future of the nation's over-the-air broadcast system is at risk, protecting that right is critical. *See Metro Broadcasting, supra*; *Red Lion*, 395 U.S. at 390.

It is similarly indisputable that the public has an equally important First Amendment right to receive access to "the widest possible dissemination of information from diverse and antagonistic sources [which] is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. at 20. Moreover, this Court has expressly found that the government has an interest in furthering the public's interest in receiving diverse viewpoints on over-the-air broadcast stations:

> [s]afeguarding the public's right to receive a diversity of views and information over the airwaves is...an integral component of the FCC's mission.

Metro Broadcasting, 497 U.S. at 567.[7] *See FCC v. NCCB*, 436 U.S. at 775, quoting *Buckley v. Valeo*, 424 U.S. 1, 50-51 (1976), quoting *Red Lion*, 395 U.S. at 393 (efforts to "enhanc[e] the volume and quality of coverage" of public issues'...[made available to the public on broadcasting stations] may be permissible where similar efforts to regulate the print media would not be").

However, when one entity has editorial control over every channel within a particular medium of expression, the public's right to the kind of source diversity that insures access to different perspectives is seriously threatened. This Court has recognized this problem in both the print and broadcast contexts. *See FCC v. NCCB*, 436 U.S. at 790 (affirming the lower court's ruling upholding newspaper-broadcast crossownership ban because ban was "designed to 'increas[e] the number of media voices in the community' and not to restrict or control the content of free speech." (citation omitted)). *Associated Press*, 326 U.S. at 20. ("[s]urely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."); *Red Lion*, 359 U.S. at 390 (citing *Associated Press*, 326 U.S. at 20) ("[i]t is the purpose of the First Amendment to reserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that

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[7]CFA, *et al.* are strong supporters of the Fairness Doctrine in broadcasting because it guarantees that different points of view will be presented in broadcasters' overall programming. *See Red Lion, supra*. However, it bears emphasis that the best way to achieve diversity is by structural and ownership rules which allow access for many different voices. *See, e.g., Metro Broadcasting, supra*. Thus, viewpoint neutral alternatives (such as must-carry) help reduce the need for reliance on viewpoint based regulations like the Fairness Doctrine.

market whether it be by the Government itself or a private licensee."); *see generally*, *Metro Broadcasting*, *supra*. Thus, the First Amendment serves to ensure that there is wide access to the marketplace of ideas, and protects against manipulation of this marketplace by private entities.

The 1992 Cable Act is wholly consistent with this purpose. Based on its oversight of the operation of the 1984 Cable Act, Congress found that the cable industry had become an entrenched, anticompetitive bottleneck, and as a result, diversity was being stifled. 1992 Cable Act, Sections 2(a)(2),(4),(5),(15),(16). As the court below recognized, cable operators' bargaining power and market influence "provides [them] with both the incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy." *Turner Broadcasting System*, 819 F.Supp. at 46.

Congress enacted the must-carry provisions specifically to diminish cable's insidious market power by insuring nondiscriminatory access to independent broadcast voices. *See* 1992 Cable Act, Section 2(b)(5); H.R. Rep. at 26-28; S. Rep. at 1-2. The purpose of these provisions was to insure viewers' access to increased and diverse sources of information, 1992 Cable Act Section 2(b)(1), as well as more speech on important public issues, which this Court has said "is the essence of self-government." *Red Lion Broadcasting*, 395 U.S. at 390.

B. Must-Carry Insures Access To Free, Over-the-Air Broadcast Television.

This Court has recognized that regulation of cable signal carriage serves the "important and substantial interest" of public access to over-the-air broadcast stations:

> In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers.

Capital Cities Cable, 467 U.S. at 714 (citation omitted)(holding that Oklahoma's law barring the retransmission of out-of-state alcohol television commercials over cable systems was pre-empted by federal law).

Thus, as a general matter, insofar as the federal interest in assuring universal access to a diverse range of viewpoints requires affirmative intervention to insure the viability of free, over-the-air broadcasting, the courts have construed the Communications Act of 1934 as giving Congress and the FCC the power to regulate cable as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. at 178.[8]

Like the cable signal regulations this Court upheld in *Crisp* and *Southwestern Cable*, the must-carry provisions at issue here further the interests of viewers in receiving ac-

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[8]While there have been significant changes in the nature of the cable industry since *Southwestern Cable*, the core symbiosis between over-the-air broadcasting and cable remains unchanged - cable enables a significant amount of the population to receive clear broadcast signals, and broadcasters provide cable systems with local and community-based programming that their subscribers are constitutionally entitled to receive. In fact, as cable penetration has crept towards 60% of American homes, the entire viewing public is even more dependant on cable to provide the information that is at the core of the First Amendment.

cess to over-the-air broadcast stations.[9] Congress found that without guaranteed carriage over cable systems, many over-the-air stations will be at risk. 1992 Cable Act, Section 2(a)(14)-(16). This is because, in the case of commercial stations (especially those smaller and economically marginal stations), advertisers will be reluctant to buy advertising time on a station that will not be available to a large percentage of their viewing audience. *See* Declaration of Jim Paymar ¶7, submitted as Appendix A to the Motion to Affirm of Appellee Association of Independent Television Stations, Inc. In the case of public television stations, viewer contributions will likely decline for essentially the same reason. Declaration of Marilyn Mohrman-Gillis ¶8, Joint Appendix at 391. The consequent diminution in revenues not only reduces the funds available to these stations for news programming and other local services, but, as Congress found, puts the economic viability of these stations in grave peril. 1992 Cable Act, Section 2(a)(14)-(16).[10]

While the economic damage to these stations will be great, the First Amendment consequences to the viewing public will be immeasurable. Absent must-carry, smaller

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[9]Nothing in the 1984 or the 1992 cable legislation has undercut the ruling in *Southwestern Cable*. Nor did this legislation alter this Court's holding that, because cable systems so extensively carry broadcast signals, the policies of the Communications Act governing broadcasting can be made applicable to cable. *See United States v. Midwest Video Corp.*, *supra*. In *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979), this Court reiterated that cable television has become "enmeshed in the field of television broadcasting."

[10]In addition, those stations owned by minorities and females are newer, and thus tend to be concentrated in the pool of economically marginal stations. *See infra* §II.C.

stations will either be forced to decrease local programming or go dark, leaving cable subscribers with less local programming addressing issues of community concern that free, over-the-air stations are statutorily required to provide in their role as public fiduciaries. More importantly, as discussed below, those stations will be unavailable as a source of crucial information on local issues for the 40% of the viewing public that does not subscribe to cable and which rely on over-the-air television as their primary source on these issues.

C. The First Amendment Rights Of Both Cable Subscribers And Those Who Do Not Subscribe Are Affected By Must-Carry.

As discussed in Section A above, the First Amendment rights *most directly* at issue in this case are those possessed by the viewing public. And, to the extent that any over-the-air broadcaster is denied carriage, viewers' access to the fruits of Title III of the Communications Act is impeded.

Upon closer scrutiny, it can be seen that the harm is particularly concentrated on less advantaged segments of the audience. The stations that have most commonly been denied cable carriage are public stations and UHF stations with smaller audiences. "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988. Those stations typically tend to address the needs of specialized segments of the audience, for example, non-English speaking and other minority communities. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC2d 1076, 1092 (1984).

Moreover, since the stations that are most at risk are typically newer and serve smaller audiences, they are more likely to reflect the FCC's relatively recent policies directed

at increasing diversity of ownership in broadcasting.[11] As such, these are the very stations that, having been licensed with the objective of broadening diversity of programming available to the public, may most effectively fulfill the FCC's goals of achieving ownership diversity.[12] This Court has recognized, for example, that "many minority broadcasters" are "late entrants who often have been able to obtain only the less valuable stations and "serve geographically limited markets with relatively small audiences." *Metro Broadcasting*, 497 U.S. at 553-54. *See also*, National Telecommunications and Information Administration, *Analysis and Compilation by State of Minority Owned Commercial Broadcast Stations*, 1993.[13] Such stations will often be the least likely to be voluntarily chosen for cable carriage by operators seeking to maximize profits; the absence

[11]FCC policies disfavor multiple ownership, 47 C.F.R. §73.3555(d), and media cross-ownership. 47 C.F.R. §73.3555(c). Policies for the award of new licenses favor owner-operators, especially those without other media interests, as well as owner-operators reflecting a broader cross-section of backgrounds and experiences. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[12]The number of UHF stations has almost doubled in the last decade; more than 350 new UHF stations have gone on the air in that time. 1992 Broadcasting/Cablecasting Yearbook at G-3. In fulfillment of FCC policies promoting diversity in programming, the mechanisms used to award new broadcast licenses have, since 1978, favored minority applicants who promise to serve as owner-operators. *See Metro Broadcasting Co., supra*; *Policy Statement on Comparative Broadcast Hearings, supra*. Licenses awarded prior to that time reflect less ownership diversity.

[13]This is also true of stations operated by women. An unpublished informal survey conducted by the Association of Independent Television Stations showed that 13% of general managers of independent stations are women. This rate considerably exceeds that of larger stations.

of must-carry would therefore impose particularly destructive damage to policies promoting viewpoint diversity through expanded ownership.

The loss would not just be detrimental to those audiences that are served by specific stations. In fact, *all* citizens are better off when minority viewpoints are presented and become a part of the public discourse. Alternative viewpoints enrich the public by challenging the way in which people view the world and exposing them to new ideas. This Court has recognized that the diversity these stations provide promotes the First Amendment interests of the entire viewing public:

> [t]he benefits of such diversity are not limited to the members of minority groups...; rather, the benefits redound to all members of the viewing and listening audience.

Metro Broadcasting, 497 U.S. at 568.

1. Appellants Ignore The First Amendment Rights Of Those Who Do Not Subscribe To Cable.

Appellants blithely assume that those who do not subscribe to cable have no stake in outcome of this case. This is simply not true. As described above, the greatest impact of must-carry is upon the viewing choices and information sources for the 40% of Americans who choose not to subscribe or do not have the means to subscribe to cable.[14] It is this group of viewers which will be most aggrieved in the long run if carriage is denied to broadcasters which then cannot remain viable.

Households that do not subscribe to cable have a

[14]Cable is completely unavailable to 10% of the viewing public. S. Rep. at 3 (citing report by Paul Kagan Associates).

particular need for broadcast service. For one thing, they do not get cable; broadcasting is all they have. Title III of the Communications Act guarantees these people access to free, over-the-air service;[15] absent must-carry, they must pay to subscribe to cable, if they can, or forgo their right to share in what is a central element of our culture.[16] Furthermore, while over-the-air television service is the primary source of information on public affairs for most Americans, it is especially important to those without cable. *See* Declaration of Gene Kimmelman, submitted as Attachment A to CFA, *et al.*'s Motion for Summary Judgment.[17]

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[15]In addition, non-subscribers tend to be poorer than those who choose to buy cable. Not only are they are less able to afford cable, but other alternative sources of entertainment and information, are also less available to them. These same families are less likely to be able to afford to travel, to see movies, and to avail themselves of other cultural outlets. Thus, they are especially dependent on television for access to other educational, cultural, dramatic, and entertainment programming, as well as informational programming. *See* Declaration of Gene Kimmelman, submitted as Attachment A to CFA, *et al.*'s Motion for Summary Judgment. Non-cable households typically have more children. *Id.* Their needs for educational and instructional programming are especially pronounced. Indeed, Congress has recently and specifically recognized these special needs by imposing additional children's programming obligations upon broadcasters in the Children's Television Act of 1990, P.L. 101-437, *codified at* 47 U.S.C. §§303a *et seq.*

[16]It is hard to overstate the importance of broadcasting to fundamental literacy and to any understanding of the shared elements of our culture. *See* G. Comstock, S. Chaffee, N. Katzman, M. McCombs, D. Roberts, *Television and Human Behavior* (1978). Most Americans place principal reliance on television for news. *See Broadcasting/Cablecasting Yearbook* A-2 (1988).

[17]Families in the lowest income bracket are far more likely to own television sets than telephones. *Id.*

Non-subscribers also have a particular need for access to the stations most adversely affected by loss of must-carry protection: public stations,[18] UHF stations seeking to address niche markets, foreign language stations, and other stations that are not affiliated with a network. *Id.* These are precisely the stations which, out of competitive necessity, seek out and attempt to serve smaller audience segments less demographically attractive to major advertisers. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC 2d at 1092.

The reduced "economic viability of free local broadcast television" which Congress found to be the likely outcome of non-carriage, 1992 Cable Act, Section 2(a)(16), would deny these viewers broad access to free over-the-air reception of entertainment, as well as news, public affairs and other programming, including programming of local origin, which promotes their First Amendment rights.[19]

2. The First Amendment Rights Of Cable Subscribers Would Also Be Adversely Affected By The Absence Of Must-Carry.

Cable subscribers are also adversely affected by the unavailability of over-the-air television stations on cable. To the extent that loss of must-carry jeopardizes the eco-

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[18]*See* 1992 Cable Act, Section 2(a)(7). In this connection, CFA, *et al.* stress that none of the several arts and instruction oriented cable TV networks share public television's statutory mandate to provide local service, and to present programs which may not be commercially viable. In 47 U.S.C. §396, Congress found, *inter alia*, that "it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities."

[19]Despite their viewers' investment through taxes and voluntary contributions, their access to public broadcasting will also be jeopardized.

nomic viability of free local broadcast television and its ability to originate quality local programming, those stations will be just as unavailable to subscribers as to non-subscribers.

Broadcast stations that are not carried on cable systems because of loss of must-carry will also impede subscribers' access to those stations that are not put out of business entirely. Congress has found that "[c]onsumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals." 1992 Cable Act, Section 2(a)(17). This phenomenon is not limited to a few rural and exurban residents. Those who reside in cities are often unable to receive over-the-air signals because of interference caused by large buildings, terrain obstructions and other phenomenon.[20]

Even those subscribers who are so located as to be able to receive satisfactory over-the-air reception are largely unable to receive stations not carried by their cable system. That is because it is not practical and feasible for most Americans to operate and install the wires and switches required to receive over-the-air service as well as cable on the same TV set. *See* 1992 Cable Act, Section 2(a)(18) (finding that use of so-called "A/B" switches "is not...feasible...."); *infra*, §III.B.2. This problem is especially acute for viewers who, by virtue of age or physical impairment, are less capable of understanding and/or manipulating A/B switches or other equipment necessary to receive an over-the-air signal. *See* Declaration of Gene Kimmelman. Thus,

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[20]*See* Testimony of Preston R. Padden, *Must-Carry: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation*, U.S. Senate, 101st Cong., 1st Sess. 62-63 (October 25, 1989).

despite Appellants' arguments to the contrary, the loss from non-carriage for cable subscribers is both very real and quite substantial.

D. Appellants Erroneously Equate The Viewing Public's First Amendment Rights With So-Called "Viewer Preference."

To the limited extent that Appellants and their *Amici* recognize any other First Amendment rights other than their own rights as speakers, they erroneously reduce viewers' rights to have access to a wide range of information and ideas into a passive concept of "viewer preference." They argue that must-carry will result in the elimination of programming that is more popular with viewers than that shown on certain broadcast stations which will now gain carriage. *See, e.g.*, NCTA Br. at 16; Turner Br. at 28-30; *Amicus Curiae* Brief of The New Inspirational Network at 26-27 ("INSP Br.").[21] The essence of this claim is that the First Amendment interests of the viewing public can best be served when left solely to the whims of the economic marketplace and the profit-minded motives of cable operators.

This argument is wrong for several reasons:

First, the First Amendment rights of *all* viewers are not served through the marketplace alone. While the 60% of the audience which subscribes to cable may, in the aggre-

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[21]The New Inspirational Network ("INSP") decries the possibility that its programming will not be carried by cable systems if must-carry is upheld. INSP Br. at 4-8. But the must-carry provisions do not require the operator to choose any particular cable programmer. Instead, they give the cable operator sole discretion to choose what programming it wants for its channels which are not reserved for must carry. Thus, as it was prior to the passage of the 1992 Cable Act, INSP's carriage depends on the needs and the desires of individual cable operators.

gate "prefer" (*i.e.*, choose to watch) certain kinds or categories of programming, this is simply reflective of what subscribers have selected from among the limited choices which the cable operators provide them. But these program offerings are not driven by viewer choice alone; what best serves the economic interests of the cable operator is not always consonant with what the largest number of subscribers themselves might be willing to purchase. Cable operators interested in selling "premium" (pay-TV) channels can tailor even their "free" channel offerings to cater to demographically attractive socioeconomic groups.[22] Similarly, vertically-integrated operators have ownership interests which can influence the selection of a less popular advertiser supported channel because it is more profitable for them to carry their own offering.[23]

The public interest standard of the Communications Act contemplates a more affirmative intervention to insure that the needs of *all* segments of the community are met, most especially those who are too old, too young or too poor to be recognized in the marketplace. It is these demographically unattractive segments of the community that are least likely to be served adequately by a cable operator intent on maximizing his profit margin. *See* discussion at §II.C., *supra*.

Second, there is a distinct and important difference between so-called viewer preferences as measured imper-

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[22]As local cable advertising grows in importance, the demographic make up of the subscriber base is increasingly significant to the operators.

[23]For example, if there are two similar shopping, sports or cooking channels available, an operator might well choose the one in which it has an ownership stake even if more subscribers would prefer the other.

fectly by cable operators and true viewer needs and wants (*e.g.*, informational, educational and local public affairs programming). While the former may be important, this Court has not been reluctant to uphold government action intended to advance the latter over the former. *See, e.g., Red Lion, supra*. Certain kinds of programming that help inform the electorate on matters relating to self-governance, certain cultural programming and certain other programming which appeals only to smaller segments of the audience is not without societal import just because more people choose to watch other material. This Court has recognized that:

> The Commission has never relied on the market alone to ensure that the needs of the audience are met. Indeed, one of the FCC's elementary regulatory assumptions is that broadcast content is not purely market driven;...."

Metro Broadcasting, 497 U.S. at 571.

Over the past decade, the FCC has placed greater reliance on the marketplace to serve the needs of the viewing public. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC 2d at 1076. However, it has done so with the clear understanding that the free market will not always fill those needs. *Id.* at 1077 ("Our action here, however, does not constitute a retreat from our concern with the programming performance of television licensees. Thus,...we are by this Order retaining the obligation of licensees to provide programming that responds to issues of concern in the community.")(citation omitted). Broadcasters remain obligated to fulfill the needs of the communities they serve even though such a service may not be in their financial best interests. *UCC v. FCC*, 707 F.2d 1413, 1427-1428 (D.C. Cir. 1983)("The clear intent of the Act was that the award of a broadcasting license

should be a 'public trust.'"). *See also, KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir. 1931).

An especially clear example of this broader view of viewers' needs is found in The Children's Television Act of 1990, *supra*. In the wake of FCC and Congressional oversight that disclosed a dearth of age-specific informational programming directed at children, Congress specifically required broadcasters to provide programming that meets the educational and informational needs of children.[24]

Finally, Appellants' arguments about viewer preference implicitly ignore the 40% of the population that does not subscribe to cable. While the direct effect of must-carry may be to change what the cable subscriber sees, the more important effect is that it insures that *all* of the viewing public, will be able to derive information from free, over-the-air stations that are charged with serving the public interest. *See supra*, §II.C.

III. THE MUST-CARRY PROVISIONS OF SECTIONS 5 AND 6 OF THE 1992 CABLE ACT ARE NARROWLY TAILORED TO SERVE IMPORTANT GOVERNMENT INTERESTS.

Must-carry easily meets the *O'Brien-Ward* standard. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Sections 4 and 5 of the 1992 Cable Act are precisely targeted to help assure that all Americans, including subscribers and non-subscribers to cable, have adequate access to a diverse and healthy free over-the-air local TV service. In particular, the must-carry sections work in tandem with the "retransmission consent" mechanism provided in Section 6 of the 1992 Cable Act in a narrowly tailored way to provide mandatory carriage only for stations likely to be dropped or otherwise subjected to discrimination from cable operators.

[24]There are numerous other instances in which Congress and/or the FCC have acted where the marketplace has failed to meet specific viewer needs. *Inter alia*, Section 312(a)(7) of the Communications Act requires broadcasters to share their use of the spectrum with federal candidates, giving those candidates a limited right of access. *See CBS Inc. v. FCC, supra*. Section 317 imposes sponsorship identification requirements on political and commercial programming. 47 U.S.C. §317.

Echoing Judge Williams' dissent below, several of the Appellants suggest that there are three putatively less-restrictive alternatives which might achieve the same objectives. But two of these - leased access and A/B switches - just do not do the job. And the third - direct federal subsidies for local broadcasters - is both ineffective and much *more* restrictive of First Amendment protections.

A. The Must-Carry And Retransmission Consent Provisions Work In Tandem In A Narrowly Tailored Manner To Insure That Viewers Receive Local Broadcast Stations While Minimizing The Number Of Instances Where Mandatory Carriage Must Be Imposed.

Appellants assert that the must-carry provisions are overbroad because they protect all broadcasters.[25] For ex-

[25]Discovery also argues that the must-carry measure is overly broad because it affords relief to all broadcasters, even those which in fact offer little local programming. Discovery Br. at 45.

If the claim is that the FCC does not require such community responsive programming for all broadcasters (including home shopping stations specifically mentioned by Discovery), the assertion is simply incorrect. For, while the FCC has in recent years eliminated requirements that TV stations provide a specific quantity of news and public affairs programming, the Commission has at all times insisted that broadcasters air programming responsive to the local needs of the community of license. *TV Deregulation (Reconsideration)*, 104 FCC 2d

ample, likening Sections 4 and 5 to the rules invalidated in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), Time Warner characterizes the 1992 Cable Act as "grossly overinclusive" because it allegedly mandates carriage of local stations regardless of whether or not those stations are truly "imperiled." Time Warner Br. at 49.

This is not so. Under the Congressionally-crafted scheme described in Sections 4-6 of the 1992 Cable Act, continued viewer access to broadcast stations is insured, but this is done by a series of self-limiting measures. In contrast to the rules considered in *Quincy*, the 1992 Cable Act mandates carriage only where it is needed, in proportion to the size of the system,[26] and provides for waivers when

357, 366-67 (1986), *rev'd on other grounds sub nom. ACT v. FCC*, 707 F.2d 741 (D.C. Cir. 1987); *UCC v. FCC*, 707 F.2d at 1430 n.54; *see also, Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992* (Home Shopping Station Issues), 8 FCC Rcd 5321, 5327 (1993) ("*Home Shopping Order*") ("[T]hese stations have been able to meet the Commission's standard on public affairs programming responsive to issues concerning the local community....").

If the argument is that the statute should be interpreted to require more, or that some broadcasters do not adequately comply with existing FCC regulations, the short answer is that this is not a valid basis upon which to mount a *facial* challenge. Rather, it merely suggests that something is wrong with enforcement of the law, not the law itself. As it happens, CFA, *et al.* and others have devoted much effort to improving compliance with, and enforcement of, the broadcast provisions of the Communications Act. Their success or failure might conceivably be relevant to a challenge to the law as it is applied, but it surely does not relate to the facial constitutionality of the 1992 Cable Act.

[26]As is more fully described in the Brief of Appellees Federal Communications Commission and the United States, under Section 4(b) of the 1992 Cable Act, no more than one-third of the total number of

circumstances warrant.[27]

More fundamentally, the overinclusion argument entirely overlooks the complex interrelationship between must-carry and the retransmission consent measure codified as Section 6 of the 1992 Cable Act.[28] This market-oriented "must-***not*** carry" mechanism is designed to induce more popular TV stations to choose to forego mandatory carriage. Recognizing that it is not necessary to force cable operators to carry many of these stations, Congress created the retransmission consent alternative. Under this scheme, set out as Section 6 of the 1992 Cable Act, commercial broadcast-

usable activated channels must be dedicated to must-carry. Systems with 12 or fewer channels need only carry three local commercial stations. *Id.* Carriage of non-commercial stations is similarly limited under Section 5(b).

[27]In implementing Sections 4 and 5, the FCC has designed an additional safety valve in the form of a broadly available waiver process which can be employed to minimize burdens arising from unusual or unanticipated discontinuities. Under FCC rules "any interested party" may file an informal petition asking the FCC to "waive any provision of the rules relating to cable television systems." 47 C.F.R. § 76.7(a).

[28]The FCC, whose construction of the purposes of Act is entitled to deference, *see, e.g., Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), regarded the two provisions as so closely related that it implemented them in a single rulemaking proceeding. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 (1993) ("*FCC Must Carry Order*"). In this regard, the FCC observed that, "While each of the provisions is distinct and functions in a separate fashion, they are related in that, with respect to local cable carriage, for example, television broadcasters on a system-by-system basis must make a choice once every three years whether to proceed under the mandatory carriage rules or to govern their relationship with cable operators by the retransmission consent requirement." *Id.* at 2966.

ers choose either must-carry or an option they have not previously had: no right to mandatory carriage, but the right to seek compensation for allowing cable carriage. Thus, by altering the compulsory copyright license formerly granted to cable systems, broadcasters can now gamble that cable operators will be willing pay them to obtain signals heretofore available free of charge.

The Senate Report describes how this market-driven process should work:

> [M]any broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system.

S. Rep. at 35-36.[29] Thus, retransmission consent not only minimizes the intrusion on cable operators, but it is implemented without direct governmental involvement in the selection process.[30]

Retransmission consent became fully operative on

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[29]The House Bill did not contain a retransmission consent provision. The Conference agreement adopted the Senate provision. H.R. Rep. No. 862, 102d Cong., 2d Sess. 76 (1992) ("Conf. Rep.").

[30]Retransmission consent is not available to noncommercial stations. 47 U.S.C. §325(b)(2)(A). This exception reflects Congress' understanding that noncommercial station are intended to operate outside of market forces. It also reflects the substantial government interest in ensuring that cable subscribers have access to noncommercial stations both because of the educational and informational programming they provide and the significant amount of taxpayer money expended to support noncommercial stations. *See* 1992 Cable Act, Section 2(a)(7).

October 6, 1993. 47 U.S.C. §325(b)(1). By now, it is apparent that the scheme works more or less as it was intended. The vast majority of commercial stations appear to have opted for retransmission consent rather than must-carry.[31] Moreover, as had been contemplated, stronger stations, (such as network-owned or affiliated properties) have proven far likely to opt for retransmission consent than weaker independent stations.[32]

Must-carry works. It has been employed only by those stations which truly need such protection. And, under the combined must-carry/retransmission consent regime, the public has received access to free, local TV service while keeping governmental intrusion via must-carry to a bare, and indirect, minimum.

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[31]A National Association of Broadcasters ("NAB") survey found that more than 80% of all television stations were seeking retransmission consent rather than must carry with at least one cable system. *20% of TV Stations Opt Exclusively for Must-carry*, Television Digest, July 19, 1993, at 1.

[32]The NAB survey, *see* note 31, *supra*, found that 90% of network affiliates were seeking to enter into retransmission consent agreements, while only 20% of the independent stations were attempting to reach such agreements. *Id.* A subsequent study found that most stations opting for retransmission consent were reaching satisfactory arrangements, and that only 64 stations, or 14% of the total, placed complete reliance on must-carry to secure full ADI carriage. Of those 64, there were no Fox affiliates, seven (11 percent) were ABC affiliates, five (8 percent) were CBS affiliates, three (5 percent) were NBC affiliates, and 49 (77 percent) were independent stations. *Cablers Cut Only 4 Percent of Stations; Study Details Carriage Landscape in the Wake of Retrans [sic] Negotiations*, The Hollywood Reporter, Oct. 28, 1993 at 4.

B. Suggested Alternatives To Must-Carry Will Not Insure That Viewers Will Continue To Receive The Same Quality And Amount Of Service Provided By Local Broadcast Stations.

Many of the Appellants and their supporters adopt Judge Williams' position that there are less restrictive alternatives to achieve the objectives which motivated adoption of the must-carry provisions of the 1992 Cable Act. *Turner Broadcasting*, 819 F.Supp. at 57. Analysis of these arguments, however, actually underscores the effectiveness and narrow tailoring which characterizes must-carry as enacted.

1. Leased Access

Several parties assert that the leased access scheme set out at 47 U.S.C. §532 is a less restrictive alternative to must carry because it minimizes government interference in the choice of speakers. *See, e.g.*, Discovery Br. at 48; *see also* INSP Br. at 26; Telephone Companies Br. at 24.

The assertion reflects a fundamental misunderstanding of the regulatory scheme established by Congress in the 1984 and 1992 Cable Acts.[33] When the leased access and must-carry provisions are assessed in light of Congress' overall regulatory scheme and the particular governmental

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[33]As is explained in the text, the 1992 amendments somewhat modify the leased access provisions first adopted in 1984. But, while the current version is more enforceable, it is not fundamentally different. Even so, notwithstanding their willingness to tolerate this substantially similar regime for the last 9 years, several of the plaintiffs have now (unsuccessfully) challenged the constitutionality of the current version of leased access in proceedings now on appeal in the D.C. Circuit. *See Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. 1993), app. filed Nov. 15, 1993. Of these, only Appellant Discovery directly advances the self-servingly inconsistent position that leased access is also a desirable, less restrictive, alternative. Discovery Br. at 47.

interests furthered by each of those provisions, it is clear that leased access is not an alternative to must-carry.

a. Regulatory History Of Leased Access

The leased access mechanism first established in the 1984 Cable Act is an important device to promote diversity in the marketplace of ideas. However, it serves different purposes, and could not substitute for, or supplant, must-carry.

Leased access resembles must-carry to the extent that it involves a set-aside of a small number of channels which are removed from the editorial control of the cable operator. 47 U.S.C. §532(c)(2). However, unlike must-carry, leased access channels are - in theory - available to any programmer unaffiliated with the cable operator. 47 U.S.C. §532(b)(1).

Along with the set-aside for municipalities to operate "public, educational and governmental" channels, *see* 47 U.S.C. §531, Congress envisioned that these channels would represent "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet...in the electronic marketplace of ideas" H.R. Rep. at 30. The House Report explained that:

> An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems to third parties unaffiliated with the cable operator, and thereby promotes and encourages an in-

crease in the sources of programming available to the public.

Id. at 39.

Thus far, leased access has not been widely utilized; programmers have had no effective means of enforcing their right to lease channels. Given the fact that cable operators remained free to exploit unutilized capacity for their own purposes, operators had sound reason to take advantage of the system of operator-established rates provided in the 1984 Cable Act to set prices at prohibitive levels.[34]

The 1992 Cable Act remedies shortcomings in the original Cable Act to make leased access channels a "genuine outlet" for diverse voices. S. Rep. at 79. Among other things, it authorizes the FCC to set maximum reasonable rates, terms and conditions, and provides a new enforcement mechanism. *See* 47 U.S.C. §532(c). In receiving comments filed in connection with the implementing rulemaking, the FCC indicated that potential lessees may ultimately provide, *inter alia*, home shopping, one-time pay per view, advertiser-supported national program feeds and premium pay program services. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Rate Regulation)*, 8 FCC Rcd 5631 (1993) ("*Rate*

[34]As the Senate Committee Report explained, "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." S. Rep. at 31.

Regulation Order"). Thus, there is now hope that leased access may begin to realize its potential.

However, success of the new medium is not assured. There are those who have argued that the FCC's implementation will allow prices to remain above a level which will make this medium cost-efficient. Indeed, the implementing regulations permit cable operators to charge higher prices for leased access than they charge their own affiliates to use other channels on the same system. *Rate Regulation Order* at 5649-51. And, significantly, in the event that demand for access channels exceeds supply, it is the cable operator who retains the discretion to choose who may obtain access.[35]

b. Leased Access' Limitation Versus Must-Carry

As valuable as leased access may become as an additional source of diversity, even if the number of channels is expanded, it cannot substitute effectively for must-carry.[36]

[35]While operators are prohibited "from setting terms and conditions for leased access use based on content," *id.* at 5942, they are free to select from among similarly situated applicants when supply exceeds demand.

[36]In his dissent below, Judge Williams suggests that leased access compares favorably with must-carry under the standards established in *Tornillo*. *Turner Broadcasting*, 819 F.Supp. at 61. But the factors he describes apply with no less force to must-carry. The fact that cable operators control many channels justifies must-carry as well as leased access. Similarly, viewers are, if anything, less likely to attribute the speech of "must-carried" broadcasters to the cable operator than the speech of a channel lessee. Finally, Judge Williams erroneously equates the "benefitted group" under leased access ("all unaffiliated programmers") with the beneficiaries of must-carry. *Id.* But as is discussed below, the objective promoted by must-carry is not access for *all* un-

First, leased access does *nothing* to advance the goal of providing continued access to free over-the-air TV service. While this is especially important for the 40% of the public which cannot, or chooses not to, subscribe to cable, the loss of the particular benefits which come from over-the-air television will also be felt by the 60% who do receive cable.

Contrary to what Judge Williams has suggested in his dissenting opinion below, *Turner Broadcasting*, 819 F.Supp. at 61, a Congressional concern in adopting leased access - a platform for unaffiliated programmers - is *not* co-extensive with the much more elaborate and specific objectives of must-carry. The fact that a few lessees may be able to program a few channels on a system does not advance the goal of preserving local television and making it available for all. *See* 1992 Cable Act, Sections 2(a)(8)-(9).

It bears particular emphasis that, contrary to some suggestion in Judge Williams' dissent, *Turner Broadcasting*, 819 F.Supp. at 65, there is no reason to expect that over-the-air broadcasters unable to obtain carriage without must-carry will be able to lease channels. The stations which are likely to be dropped absent must-carry are already economically marginal properties; they are not likely to be able to lease carriage they now receive free of charge.[37] And,

affiliated programmers, but access for free local commercial and non-commercial TV stations, precisely because they serve as fiduciaries of the public and are likely to provide service that is different from other unlicensed programmers not subject to the legal obligations of broadcasters.

[37]Using the FCC's estimate of 50 cents per subscriber per month as a likely leased access rate, *Rate Regulation Order* at 5950-51 n.1312, it would cost $11 million per year to lease a channel to serve all the cable households in the Philadelphia metropolitan area. The average annual

even if they attempt to lease channels, in the event that demand exceeds supply, the cable operator is under no obligation to lease channels to them.[38] While the FCC has attempted to prohibit discrimination based on content, it has not prohibited discrimination based on source. Since local broadcasters compete directly with cable operators for local advertising, the operators have powerful incentives to lease their channels to others.

Second, leased access does absolutely *nothing* to advance the goal of Section 5 to provide a national non-commercial TV service or to bring it to the taxpayers who finance it. It has no mechanism, for example, to insure access for non-market driven programming provided on public TV (often on UHF stations) which serves special artistic needs, provides a platform for experimentation and otherwise meets the needs of those who are not demographically attractive to commercial programmers.

Third, as implemented, there are many other practical obstacles to the broad availability of leased access as a substitute for must-carry. The current scheme already does not provide enough channels, and if there were no must-carry channels this problem would be exacerbated several-

pre-tax income of an independent television station in 1992 was $2,007,821; the average annual pre-tax income for a UHF station in 1992 was $500,000. Fratrik and Helregel, *1993 NAB TV Financial Report* 64 (1993).

[38]In this situation the cable operator will already have decided not to carry the station voluntarily. Where demand for channels exceeds supply, it is reasonable to assume that it will choose to lease to other applicants whose programming is more to the operators' liking, especially since local TV stations compete directly for advertising.

fold.[39]

The pricing mechanism favors home shopping services and satellite-delivered entertainment services which can spread programming costs simulcast on a large number of systems. *Rate Regulation Order* at 5631. These problems might be ameliorated somewhat by introducing more stringent price controls and the set aside of more channels. This, however, would reduce the claimed advantage of leased access versus must-carry by making the supposedly less restrictive alternative more restrictive.

Finally, as explained above, while leased access channels are set aside for unaffiliated programmers, if demand exceeds supply, cable operators still retain the discretion to select who may obtain access.

2. A/B Switches

Appellant Time Warner argues that so-called A/B switches represent an effective alternative to must-carry that will serve essentially the same interests with little or no interference with cable operators' speech. Time Warner Br. at 48.

An A/B switch is a mechanical device which can be installed to allow "consumers to shift between cable and their own antenna." H.R. Rep. at 54. Congress, however, has examined this alternative and has found that A/B switches and similar devices are "not an enduring or feasible method of distribution and [are] not in the public interest." 1992 Cable Act, Section 2(a)(18); *See* Declaration of

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[39]Almost 20% of systems have no leased access obligation under 47 U.S.C. §532(b)(1)(D) because they have 36 or fewer channels. *See* TV Factbook, Cable Systems Volume, Warren Publishing (1993 Edition) at F-3. Larger systems must set aside at most 10-15% of their channels. 47 U.S.C. §§532(b)(1)(A)-(B).

Gene Kimmelman. In the words of the House Committee Report, "these switches are cumbersome, often ineffective, and are unacceptable to consumers." H.R. Rep. at 54.[40]

3. Direct Subsidies

Further echoing Judge Williams' dissent in the district court, Appellants Time Warner and the NCTA also suggest that directly subsidizing the speech of local broadcasters could be an alternative to must-carry. Time Warner Br. at 48; NCTA Br. at 41; *see also Turner Broadcasting*, 819 F.Supp. at 57 (Williams, J., dissenting). Relying on the notion that government may constitutionally subsidize

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[40]Indeed, consider the following passage describing one of three different hook-ups diagrammed in a newspaper consumer-service column:

> In System 1, two converters are used, one to switch the 300-ohm, twin-lead antenna wire coming from the antenna to a 75-ohm F-connector for attaching to the antenna-in jack of the VCR. This connector pushes onto the jack on the back of the VCR. As a general rule, however, the closer you can put the converter to the antenna the better. The goal is to use as little twin-lead wire as possible.
>
> The second conversion is made as the TV set, where the 75-ohm coaxial cable has to be changed back to 300-ohm antenna wire to be attached by screws to the TV set (which, in this case, is a basic-model without an F-connector antenna input). The only problem someone with this set-up might find concerns the TV set's antenna. Because it's picking up signals, it could affect the audio and video quality of the signal sent from the VCR. If you can't detach the dipole antenna, do your best to minimize the amount of signal it's capable of picking up. Close the antenna into its smallest formation and keep it tucked down, letting the antenna attached to the VCR do all the work. Then, when you want to watch a program different from one you're taping, you can simply put the dipole antenna into the proper position for the channel you want.

"Making The Right Video Connections," The Chicago Tribune, Jan. 9, 1987, at 56.

speech it favors, they reason that subsidies are more desirable than must-carry because they do not infringe on the First Amendment rights of the cablecasters. *Turner Broadcasting*, 819 F.Supp. at 64-65 (Williams, J., dissenting).

But such direct subsidies would actually be far more intrusive than the self-executing must-carry provisions.

Direct subsidies from the government to some, but not all, licensed broadcasters would create a close, on-going relationship between the stations receiving funds and the government. Congress and the Executive Branch would have to determine which stations would receive subsidies, forcing judgments about the worthiness of the recipients of the funds. Determinations as to whether to give subsidies to broadcasters whose format is substantially devoted to religious programming would create almost unimaginable complications under the Free Expression and Establishment Clauses. These subsidies would, therefore, create a situation similar to the scheme held invalid in *FCC v. League of Women Voters*, 468 U.S. 364 (1984). In that case, as was explained in *Rust v. Sullivan*, the government "placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 111 S.Ct. at 1774 (emphasis in original).

The subsidy approach is further complicated by the special role given over-the-air broadcasters in the political and electoral process. Under 47 U.S.C. §312(a)(7), broadcasters are required to provide reasonable access to federal candidates. *See CBS, Inc. v. FCC, supra*. Under 47 U.S.C. §315, broadcasters must provide "equal opportunities" to candidates, and sell time at preferred rates. Even if politicians and government officials overlook efforts to curry favor, the incentive will always exist for broadcasters

who are looking for a special subsidy.[41]

Must-carry has none of these complications. It is self-executing. Working in conjunction with retransmission consent, it does not involve any governmental involvement. Broadcasters have no reason to imagine that political favoritism will be rewarded under must-carry.[42]

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[41]The time-tested, even-handed scheme under which these policies have been administered has proven quite immune from such favoritism. However, a subsidy scheme in which benefits will be awarded selectively to some, but not all, broadcasters, perhaps by an agency lacking the traditions and safeguards of the FCC, is much more susceptible to misconduct.

[42]Counsel wish to acknowledge the assistance of law student interns Jason G. Wilson and Greta Thomasson.

CONCLUSION

The judgment of the three-judge District Court should be affirmed.

Respectfully submitted,

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